EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

STATEMENT OF G. EDWARD DESEVE
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AND
CONTROLLER
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE
SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,
NATURAL RESOURCES, AND REGULATORY AFFAIRS
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
U.S. HOUSE OF REPRESENTATIVES

June 17, 1998

Good afternoon, Mr. Chairman and members of this Subcommittee. Your letter of invitation asked me to discuss two topics: (1) implementation of the Congressional Review Act by OMB's Office of Information and Regulatory Affairs (OIRA); and (2) cooperation with the Subcommittee's requests for information regarding the White House Climate Change Initiative, including OMB's review of pending letters of response from specific agencies.

CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

The Congressional Review Act[1] had the strong support of President Clinton. It was signed on March 29, 1996. By passing this law, Congress acknowledged and assumed more responsibility for its continuing role in the regulatory system. For too long, Congress passed laws, taking credit for mandating clean air, or a safe workplace, only to question or even criticize the agency rule that implements the law. With this law, Congress will see what it has authorized, and can speak to any regulatory actions that it thinks are <u>not</u> true to its intent.

I welcome the opportunity to discuss what has happened over the past two years, and to hear the experience of GAO in administering the law.

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[1] 5 U.S.C. chapter 8, passed in Title II, Subtitle E, of P.L. 104-121.

1. What does the statute require?

To help focus our discussion, let me first summarize this legislation. In general terms, agencies are to send a copy of each new final rule (and certain analyses that they may undertake related to the rule) to both Houses of Congress (for transmittal to the appropriate authorizing Committees) and to the General Accounting Office (GAO) before the rule can take effect.

When an agency sends a rule to Congress and GAO, the agency is to indicate whether the rule is "major" or not. The statute directs OMB's Office of Information and Regulatory Affairs (OIRA) to find whether a rule meets the statutory definition of "major"-- that is, whether the rule is likely to result in an annual effect on the economy of over $100,000,000; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises.

The designation of a rule as "major" has several consequences. Unless exempted, a major rule may not take effect until 60 calendar days after it has been submitted to Congress. In addition, GAO is to provide a report to the agency's authorizing Committee on each major rule. Whether or not a rule is designated as "major," Congress has 60 legislative days during which it may use expedited procedures to disapprove the rule.

I want to stress that there are two distinct time periods in the statute -- (1) the delay in effective date for "major" rules, and (2) the Congressional review period, during which the expedited review procedures are available:

(1) Effective Date. "Major" rules can only take effect, with certain exceptions, 60 calendar days after submission to Congress and GAO. "Non-major" rules take effect as they normally do after submission. All of the rules that were submitted to Congress under this Act year went into effect according to these effective date provisions.

(2) Congressional Review Period. If, within a prescribed time period, a Member introduces a joint resolution of disapproval, then that joint resolution is subject to certain expedited procedures for consideration in Congress. All rules (both major and non-major) are subject to this Congressional review for 60 legislative days, which, depending on when Congress is or is not in session, is a time period that can extend to over one-and-a-half years. During the past two years, all the rules issued by the agencies went into effect before the expiration of the Congressional review period.

2. *What did OIRA do when the statute took effect?*

The Congressional Review Act took effect immediately on the day the statute was signed into law -- on Friday, March 29, 1996. Most agency staff knew little about it. To help them prepare quickly, OIRA moved quickly. On Tuesday, April 2, 1996, the OIRA Administrator, Sally Katzen, sent an OMB memorandum (M-96-19) to the heads of all agencies outlining the provisions of the new legislation and discussing the definition of "major." Based on advice OMB staff received from Congressional staff, Ms. Katzen included the address of the House Clerk and the Secretary of the Senate as the place to which agencies should send their final rules.

Two weeks later, after agencies had begun to send their final rules to these officials, she received telephone calls asking that final rules go to the Speaker of the House and the President of the Senate, and that they be transmitted with a cover letter providing certain information. On April 19, 1996, she sent another memo to the heads of Federal agencies, providing these new addresses and the content suggested for the cover letter.

Meanwhile, as Chair of the Regulatory Working Group established under Executive Order No. 12866, the OIRA Administrator stressed to agency Regulatory Policy Officers the importance of moving quickly to implement this new law. During this time, OIRA staff were receiving a variety of questions from agency staff about what they should do under the new statute. OIRA then prepared a document entitled "Frequently Asked Questions," which was

distributed to OIRA staff to answer these questions and to share with agency staff if they so desired. I have attached a copy of each of these memoranda at the end of this written statement.

In addition, because OIRA does not review the regulations issued by the independent regulatory agencies under Executive Order 12866, OIRA had to design a process to determine whether the final rule of an independent regulatory agency is "major" within the meaning of the statute. Therefore, OIRA invited regulatory contacts from the independent regulatory agencies (those not subject to Executive Order 12866 review) to a meeting on April 12, 1996, to discuss OIRA's April 2 memorandum and how they could best coordinate regarding OIRA's determination of "major." After this meeting, the independent regulatory agencies began sending OIRA summaries of their upcoming final regulations to allow OIRA to decide whether or not these rules were "major." Initially, there was a flurry of staff discussions. This process for the "independents" has now become routine.

For those agencies whose regulations are subject to review under Executive Order 12866, the OIRA Administrator asked OIRA staff to ensure that the agencies understood which rules were "major." The term, as defined in the statute, is similar, but not identical, to the category covered under section 3(f)(1) of Executive Order 12866 for "economically significant" rules. The statutory definition of "major" was taken from a predecessor Order, Executive Order 12291 (signed February 17, 1981, and revoked September 30, 1993). Accordingly, OIRA staff were told to use the same interpretation that they had relied on when carrying out their regulatory reviews under Executive Order 12291.

It is now routine for OIRA to implement the CRA as it reviews rules under Executive Order 12866. OIRA staff determine whether or not the draft rules should be considered "major" in the course of their reviews. They also review the various analyses agencies perform to determine whether they meet the appropriate standards.

3. Where are we now?

In their testimony, GAO informs us that it has received 131 major rules and 9,052 non-major final rules -- an average of roughly 80 rules a week. Overall, this indicates that the agencies are making serious efforts to comply with the statute and that the authorizing Committees are receiving a lot of rules.

However, agency compliance has not been 100% complete. In November 1997, GAO prepared a list that pointed out that agencies had not submitted 279 final rules on a timely basis. Recently, GAO prepared another list indicating that 66 final rules had not been submitted on a timely basis. We are pleased that the agencies are doing so well (97% compliance for the first check), that the rate of compliance is increasing (over 99% compliance for the second check), and that GAO and OIRA are working together so well in helping this to happen.

We also know that compliance with the CRA is not cost free. It takes effort and resources for agencies to transmit the rules to Congress, for Congressional staff to process the agency submissions, for the authorizing Committees to review them, and for GAO to keep track of all the submissions and prepare reports for major rules. We hope that the authorizing Committees find this information useful and helpful.

REQUESTING INFORMATION ABOUT THE CLIMATE CHANGE INITIATIVE

Regarding your questions about our cooperation with the Subcommittee's requests for information regarding the White House Climate Change Initiative -- we worked diligently to prepare written answers to the questions you raised in the March 2 and March 6, 1998, letters sent jointly to OMB and the Council on Environmental Quality (CEQ). You were sent responses on May 13 and June 9. You have the responses to both letters and the accompanying documents collected through a search of the files of both agencies. The time it took us to respond was dictated by the length and complexity of the questions you posed.

With respect to the process for review of agency responses to the Subcommittee's request for information, we followed the normal interagency review process coordinated by OMB and used for congressional reports, testimony, or follow up questions from congressional hearings. The amount of time involved in reviewing an agencies response was, in part, determined by the number of responses in the review process at any one time. Obviously, reviewing a number of agency responses involving 80 to 100 questions and answers submitted for review at the same time slowed down the process considerably.

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I appreciate the opportunity to testify, and welcome any questions that you may have.

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ADMINISTRATOR
OFFICE OF
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APR - 2 1996

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS, AGENCIES, AND INDEPENDENT ESTABLISHMENTS

FROM: Sally Katzen

SUBJECT: New Statutory Procedures for Regulations

All agencies need to be aware of the enactment, on Friday, March 29, 1996, of new provisions concerning Congressional review of regulations (enacted as Chapter 8 of Title 5, U.S. Code) and the Regulatory Flexibility Act.

Chapter 8 applies to every Executive branch "agency" as defined in 5 U.S.C. 551(1); this definition includes the independent regulatory commissions and boards. Chapter 8 applies to every final or interim final rule, with certain exclusions: e.g., any rule relating to agency "management or personnel" or agency "procedure or practice." Chapter 8 distinguishes between major and non-major rules (see definition below).

For All Final Rules: Each agency is now to submit a report -- containing a copy of each final rule, a "concise general statement" of the rule (including whether it is a "major" rule), and the rule's effective date -- to each House of Congress and to the GAO **before the rule can take effect**. Once this obligation is satisfied, all non-major final rules may take effect on the date provided by the agency.

Each agency needs to submit this report for any rule issued on March 29, 1996 and thereafter. When the agency submits this report, the agency is also to submit to GAO, and to make available, upon request, to each House of Congress, the analyses identified in the statute -- e.g., cost-benefit, regulatory flexibility and unfunded mandates analyses.

For All Major Final Rules: On or after March 29, 1996, for all major final rules, the effective date is generally no earlier than 60 days after the later of Congressional receipt of the material submitted or Federal Register publication. The effective date of a major rule may be sooner if the President determines in an Executive Order that the rule should take effect because such rule is necessary for certain reasons (e.g., an emergency situation). The effective date may also be sooner if the agency "for good cause" finds that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

"Major" rule is defined to be any rule that the Administrator of the Office of Information and Regulatory Affairs finds "has resulted in or is likely to result in an annual effect on the economy of $100,000,000 or more;" a "major" increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or "significant adverse effects" on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises. This definition excludes any rule promulgated under the Telecommunications Act of 1996, and the amendments made therein. This definition of "major" is similar but not identical to the definition of economically "significant" under section 3(f)(1) of E.O. 12866. If there are questions concerning whether a rule is "major," please contact the Office of Information and Regulatory Affairs as soon as possible during the rulemaking.

Chapter 8 establishes special Congressional procedures for disapproval of rules. The Congressional disapproval procedures apply to all major final rules that were promulgated between March 1, 1996 and March 29, 1996, and to all final rules (major or not) promulgated thereafter.

Submissions to Congress should be sent to both Houses: the House Clerk, Ms. Robin H. Carle, H-154, the Capitol, Washington, D.C. 20515-6601, and the Secretary of the Senate, Mr. Kelly D. Johnston, S-208, the Capitol, Washington, D.C. 20510-7100. GAO requests that agencies send their submissions to Mr. Robert P. Murphy, General Counsel, General Accounting Office, Room 7175, 441 G Street, N.W., Washington, D.C. 20548. As agencies start sending material to the Congress, they should consider creating a tracking system, both to permit them to demonstrate compliance and also to enable agencies to provide (when requested) data on what was sent.

Chapter 8 took effect on the date of enactment. In addition, the same law made amendments to the Regulatory Flexibility Act -- in part to provide for judicial review. These amendments take effect 90 days after enactment (i.e., June 27, 1996).

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I appreciate that there is much that has to be done quickly -- both the submission of particular materials and the institution of an ongoing process. I welcome your comments and suggestions on how best to implement this new law to make it useful for Congress and workable for the agencies.

A copy of the text of Chapter 8 is attached.

Attachment

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APR 19 1996

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS, AGENCIES, AND INDEPENDENT ESTABLISHMENTS

FROM: Sally Katzen

SUBJECT: Revised Instructions, Effective Immediately, for Submission of Agency Regulations for Congressional Review

On April 2, 1996, I sent you a memorandum stating that the reports for final rules should be sent to the Secretary of the Senate and the House Clerk, as well as GAO. Those Offices have since requested that the reports go to the President of the Senate and the Speaker, viz. --

The Honorable Al Gore, the President of the Senate, S-212, the Capitol, Washington, D.C. 20510;

The Honorable Newt Gingrich, the Speaker, H-209, the Capitol, Washington, D.C. 20515; and

Mr. Robert P. Murphy, the General Counsel, General Accounting Office, Room 7175, 441 G Street, N.W., Washington, D.C. 20548.

This morning we received a call stating that each transmittal must include a letter, addressed specifically to the identified individuals, and signed by an agency official at an appropriate level for transmitting documents to the Congress. They also asked that the cover letter include a contact person and telephone number in case they have any questions concerning the rule. We understand that some of the reports that have already been submitted are being returned or are being held because of the absence of an appropriate transmittal letter.

CONGRESSIONAL REVIEW OF AGENCY RULEMAKING
5 U.S.C. Chapter 8
Enacted in P.L. 104-121 (March 29, 1996)

Frequently Asked Questions

I. SUBMISSION OF RULES TO BOTH HOUSES OF CONGRESS AND GAO.

1. Which agencies have to submit their rules to Congress and GAO?

   A: Chapter 8 applies to every Executive branch "agency" as defined in 5 U.S.C. 551(1); this definition includes the independent regulatory commissions and boards.

2. Do agencies submit all rules before they can take effect?

   A: Agencies are to submit all final or interim final rules, with certain exemptions.

   Agencies do not need to submit proposed rules.

3. What are these exemptions?

   A: In its definition of "rule," the statute excludes "any rule of particular applicability" (§ 804(3)(A)); any rule relating to agency "management or personnel" or agency "procedure or practice that does not substantially affect the rights or obligations of non-agency parties" (§§ 804(3)(B) & (C)); and any rule concerning monetary policy issued by the Federal Reserve Board (§ 807).

4. Are there any other exemptions?

   A: No. There is no other exemption from the requirement to submit final and interim final rules to Congress.

   Not only do agencies have to submit to Congress and the GAO the "significant" and "economically significant" final and interim final rules that OIRA reviews under E.O. 12866, but agencies have to submit to Congress and the GAO the non-significant final and interim rules that OIRA does not review as well as the general categories of final and interim final rules that OIRA has exempted from centralized regulatory review.

5. Do agencies have to submit to Congress and GAO more than the text of the rule?

   A: Yes. Each agency is to submit a "report" containing a copy of each rule, a "concise general statement" of the rule (including whether it is a "major" rule), and the rule's effective date.

   No particular format is required for this report, although each report has to be in the form of, or covered by, a formal

transmittal letter. The transmittal letter has to be addressed specifically to the identified individuals, and signed by an agency official at a level appropriate for transmitting documents to the Congress. The cover letter also has to include a contact person and telephone number in case they have any questions concerning the rule.

Submissions are to be sent to both Houses of Congress and GAO:

The Honorable Al Gore, the President of the Senate, S-212, the Capitol, Washington, D.C. 20510;[1]

The Honorable Newt Gingrich, the Speaker, H-209, the Capitol, Washington, D.C. 20515; and

Mr. Robert P. Murphy, the General Counsel, General Accounting Office, Room 7175, 441 G Street, N.W., Washington, D.C. 20548.

6. Does the agency have to send anything else to the GAO?

A: Yes. When an agency submits this "report" to Congress and the GAO, the agency is also to submit to GAO, and to make available, upon request, to each House of Congress the analyses prepared as part of the rulemaking. These include:

Any cost-benefit analysis [and, if the risk assessment is set forth as document separate from the benefit analysis, the risk assessment];

Any Regulatory Flexibility Analysis (including any certification that such an analysis is not needed);

Any action under Title II of the Unfunded Mandates Reform Act of 1995 (i.e, the required written statement and attendant selection of the "least costly, most cost-effective or least burdensome alternative"); and

"Any other relevant information or requirements under any other Act [e.g., Paperwork Reduction Act of 1995] and any relevant Executive Orders."

Agencies are to send these analyses to GAO and make them available to Congress for <u>all</u> rules, not just those designated as "major."

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[1] Administrator Sally Katzen's April 2, 1996, memorandum suggested that submissions to the Senate and House should be sent to the Secretary of the Senate and the House Clerk. Those Offices have since requested that submissions go to the President of the Senate and the Speaker. That change in addressees is set forth in Sally Katzen's April 19, 1996, memorandum.

7. When did 5 U.S.C. Chapter 8 take effect?

A: Chapter 8 took effect on March 29, 1996.

Each agency needs to submit the report to Congress and GAO (and the related analyses to GAO) for any final and interim final rule issued on March 29, 1996, and thereafter.

Note: Section 802(e) makes any major final rule "promulgated" between March 1, 1996, and March 29, 1996, subject to the Congressional disapproval procedures in § 802; it does not appear that these major rules need to be submitted to the Congress or GAO. This appears to be the only provision applicable to final rules issued before March 29, 1996.

II. EFFECTIVE DATES.

8. When do "non-major" rules take effect?

A: As a general matter, most rules (rules other than those designated as "major") may take effect at the time designated by the agency, if the agency has previously (or on the same day) submitted the rule to Congress (§ 801(a)(4)).[2]

9. When do "major" rules take effect?

A: As a general matter (and assuming that the Congress has not passed a joint resolution of disapproval during the first 60-days), "major" rules may take effect no earlier than 60 days after the later of Congressional receipt of the material submitted[3] or Federal Register publication. "Major" rules may take effect later if the agency so desires.

A major rule may take effect before the 60-day time limit under two circumstances: (1) if the President determines in an Executive Order that the rule should take effect because such rule is necessary for certain reasons (e.g., an emergency situation) (see § 801(c)); or (2) if the agency "for good cause" finds that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest" (see § 808(2)).[4]

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[2] Note: for non-major rules, the statutory requirement is that the agency "submit" the rule (§ 801(a)(1)(A)).

[3] Note: for major rules, the statutory requirement is that "Congress receives the report submitted..." (§ 801(a)(3)).

[4] The effective date may also be sooner if the rule relates to "hunting, fishing, or camping" (§ 808(1)).

10. Several statements in recent press stories have suggested that a rule may not take effect until Congress has completed its review. Is this accurate?

A: No. Agency final and interim final rules take effect as described above. Congressional review does not change the effective date of an agency rule unless and until Congress passes a joint resolution of disapproval.

11. What is a "major" rule?

A: "Major" rule is defined to be any rule that the Administrator of the Office of Information and Regulatory Affairs finds "has resulted in or is likely to result in an annual effect on the economy of $100,000,000 or more;" a "major" increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or "significant adverse effects" on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises.[5]

This definition of "major" is similar but not identical to the definition of economically "significant" under Section 3(f)(1) of E.O. 12866. For those agencies subject to E.O. 12866 regulatory review, an agency should indicate whether it considers the rule as "major" when it submits the proposed rule for OIRA review. If there are, in other cases, questions concerning whether a rule is "major," agencies should contact their Desk Officer in the Office of Information and Regulatory Affairs (OIRA) as soon as possible in the rulemaking.

12. In case of general questions, who in OIRA should agencies contact?

A: Jefferson B. Hill, 395-3176.

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Note: A few days ago, extended statements appeared in the Congressional Record from the House and Senate sponsors discussing this statute. These were inserted by Senator Nickles on April 18, at page S3683, and by Congressman Hyde on April 19, at page E571.

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[5] This definition excludes any rule promulgated under the Telecommunications Act of 1996.